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No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

This case concerns the enforcement of the arbitration provisions of a collective bargaining agreement. Section 301 of the Labor Management Relations Act of 1947 was enacted for the express purpose of providing a means for enforcement of collective bargaining agreements, and federal policy particularly favors enforcement of obligations to arbitrate. Only two reasons can justify refusal to enforce such an agreement—that the courts lack jurisdiction or that the agreement is void because it violates public

policy. Respondent utterly fails to establish that either ground is present in this case.

Its contentions reduce to a plea that it be relieved from its contractual obligation to arbitrate because an award might result in hardship to Respondent. But alleged hardship to Respondent, here by no means certain or even probable, is no justification for avoidance of contractual obligations.

Respondent ignores the hardship to a union which would ensue from denial of its contractual right to arbitration. Such denial would not only weaken the overall structure provided for enforcement of agreements to arbitrate, but would also wipe out the fruits of collective bargaining in a vital contract area.

I. There Is No Basis for Denial of Court Jurisdiction to Compel Arbitration.

Respondent's position with respect to *Smith* v. *Evening News Association*, 371 U.S. 195, and the preemption decisions of this Court is not without ambiguity. At the outset, Respondent appears to contend that this case is to be considered in the light of the possible exception to the general rule set forth in *Smith* that jurisdiction under § 301 is not to be denied by virtue of concurrent NLRB jurisdiction over the subject matter involved in a claimed contractual breach. Thus, Respondent states that "one of the situations reserved in *Smith* v. *Evening News* must now be resolved" (Resp. Br. p. 13). Later in its brief Respondent argues that the arbitration should be denied on the basis of the much broader preemption doctrine on the ground that Congress intended the Board to have exclusive jurisdiction over the grievance dispute (Resp. Br. pp. 38-44).

But Respondent concludes (Resp. Br. p. 45):

> "Whether or not, strictly speaking, the result below should be expressed in terms of 'preemption,' the preemption cases provide a forceful *analogy* supporting affirmance. Without reliance on any '*doctrine*' the decision below should be affirmed on the basis that the overall scheme of the Act requires that the instant dispute be resolved by the NLRB to the exclusion of an arbitrator under the IUE Agreement." (Emphasis added).

Respondent's hesitancy to embrace either the possible *Smith* exception, or the preemption decisions, as governing this dispute stems, not from any argumentative inability, but from its realization virtually conceded in its final sentence that no "doctrine" can be applied to this case which would result in affirmance of the decision below.

A. *The Reservation in Smith* v. *Evening News Need Not Be Reached in this Case.*

The decision of this Court in *Smith* left little ambiguity that if, in the future any basis should arise for denying enforcement of a collective bargainging agreement under Section 301 because of collision with the functions of the NLRB under the National Labor Relations Act, such denials would occur because the dual jurisdiction of the courts and the Board, which Congress intended under Section 301 and Title I of the Labor-Management Relations Act, might give rise to an existing serious problem which could not otherwise be resolved. The Court stated: "If, as Respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an

unfair labor practice, *we shall face those cases when they arise.*" 371 U.S., at 197 (Emphasis added).[1] Respondent has failed to demonstrate that such serious problems have arisen in this case.[2] Its parade of "foreseeable consequences" which will "almost inevitably" or "almost unquestionably" result from arbitration (Resp. Br. 14, 16, 28) is dependent on a pyramiding of assumptions—as to the facts which will be developed in arbitration, as to the outcome of the arbitration, as to its own conduct, as to the conduct of the Federation, and as to the legal posture of the parties in the event that its assumptions of the facts were to materialize. Its entire argument is built on speculation. It can not and does not point to a single concrete serious problem which will arise simply because arbitration is ordered in this case. The worst that will then happen will be that an arbitrator will hear and determine the issues in this case. What happens thereafter will depend upon the

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[1] It is clear, and Respondent does not appear to contend otherwise, that the *Smith* decision does not establish that arbitration is to be denied if such a serious problem is encountered.

[2] In approaching the situations reserved in *Smith*, Respondent asserts that regardless of the nature of the grievance, "critical to the decision here is the nature of the dispute in terms of the stated objective of the grievance, available remedies under the Act, impingement on the statutory rights of the employees affected, impact on the two rival unions and the employer and the foreseeable consequences of bilateral collective bargaining agreement arbitration as opposed to NLRB determination." (Resp. Br. 14). Petitioner cannot agree that these considerations are all relevant, let alone critical. By Respondent's own statement (Resp. Br. 12) the critical consideration is whether serious problems will arise from the arbitration of the grievance in the light of the concurrent jurisdiction of the Board, and, if so, how those problems are to be resolved. But even if Respondent's list of critical considerations were all deemed pertinent, their application confirms the error of the decision below. As we show herein, the objective of the grievance is to cure the violation of the agreement; there are no available remedies for that violation under the Act; arbitration of the grievance will not infringe statutory rights; and the impact of arbitration on the two unions and the employer and foreseeable consequences of bilateral arbitration give rise to no present serious problems and at worst are sources of speculation.

ultimate combination of the myriad possibilities with respect to the facts, the conduct of Respondent, of Petitioner, of the Federation, and of the Board and the courts should there be resort to either or both thereafter.

For example, Respondent here contends that serious problems will arise because of Section 7 rights of employees which it asserts Petitioner and the Government have ignored and which will be affected "Under any comprehension of the underlying grievance" and "the ruling of a contract arbitrator." (Resp. Br., 14-16.) This contention is not only wrong on the law, as demonstrated below, but rests on the multiple assumption that IUE seeks, through arbitration, representation rights for employees who are not appropriately included in its unit without affording them an election to which they are entitled.[3] But these assumptions go to the merits of the grievance and the appropriate remedy if one is warranted. Both are as yet undetermined, and are the very issues for an arbitrator to decide. If the grievance has merit, then the assumption that the employees are entitled to an election requires more than mere assertion to sustain it.

Respondent's assertion that it could not comply with any award without risking violations of Section 8(a)(5) and Section 8(b)(3), or unspecified charges and damage actions by employees, similarly depend upon successive unwarranted factual assumptions—that IUE will receive an award entitling it to representation rights for the engi-

[3] Respondent's argument is based on the assumption among others, contrary to the record, that Petitioner seeks to represent all Engineering Laboratory employees, without regard to whether they were transferred from the production and maintenance unit or whether they perform production and maintenance work. See n. 16, *infra*. Respondent also assumes that the IUE unit excludes, and the Federation unit includes, the Engineering Laboratory as such. But neither the units as described by the Company at the time of certification nor those agreed upon by contract draw a distinction on location or departmental lines. The distinction is drawn on the basis of function (R. 13, 27, 30).

neering laboratory employees regardless of the merits of its grievance, that the Federation will seek and receive a similar award, that Respondent will be defenseless to a refusal to bargain charge by the unions whose award is not complied with, and that other undisclosed grounds for action against Respondent will exist (Resp. Br. 17, 23). The multiple assumptions are not only speculative and unsupported, but are entirely self-serving, for as Respondent concedes, any substantial fears of such exposure could be tested by refusal to comply with an award when its terms are known (Resp. Br. 17). See also *Westinghouse Electric Corp.*, 144 NLRB No. 49.

Even assuming, without conceding, that the IUE's grievance improperly seeks recognition for engineering laboratory employees, it does not follow that the arbitrator will grant that remedy or that he is powerless to fashion a remedy which he finds appropriate under all the circumstances if he finds that the grievance has merit. See *Steelworkers* v. *Enterprise Wheel Corp.*, 363 U.S. 593. The issue here is whether the grievance raises an arbitrable question which ought to be arbitrated, not whether a remedy has been requested which can or should be granted.[4]

The short answer to all Respondent's speculations is that the direction of arbitration and rendering of an award in itself will give rise to none of the problems raised by Respondent. The possible exception to *Smith* does not concern itself with "fear of possible conflict" which "can

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[4] Should the arbitrator find that Respondent violated the agreement, the arbitrator has broad discretion as to the relief, if any, he may award. He may require the return of work to the unit; he may require that certain jobs in the engineering department be considered as part of the bargaining unit; or the relief may take alternative forms. See *Carey* v. *General Electric Company*, 315 F. 2d, at 507-508: "Arbitration may well contribute to industrial peace even if it results in the arbitrator's determination that he can make no valid award because of limitations upon his authority, or that the employee has no case on the merits." See also *United States Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568.

easily be exaggerated'' *Carey* v. *General Electric Co.*, 315 F.2d 499, at 509 (C.A.2), but with the existence of actual conflict raising serious problems. Only when such problems are demonstrated need their consequences be faced. Indeed, Respondent's present predictions of dire collisions of rights if arbitration should proceed are no different from the unsuccessful effort in *Carey* v. *General Electric Co., supra,* to resist arbitration on the asserted ground that a grievance to be arbitrated sought to compel the Company to violate Section 8(a)(3) of the Act. The Second Circuit rejected the asserted conflict as ''conjectural'' noting that there were many possible resolutions which would not violate the Act. The Court stated:

> ''Only if none of these approaches is adopted by the arbitrator would it become necessary to determine whether a court should enforce an award that clearly compels an unfair labor practice. To do so now would be to 'raise an unfair labor practice question prematurely and gratuitously'. . .'' 315 F. 2d, at 512.

The possible injuries which would result from proceeding with arbitration are ''too speculative'' to warrant denial of enforcement of the arbitration agreement. *Whitehouse* v. *Illinois Central R.R. Co.*, 349 U.S. 366, 371-373.

B. *The Preemption Doctrine Is Inapplicable*

Respondent's efforts to apply preemption theory to this case, in the face of insurmountable odds, fail to meet the obvious arguments against its application to contract enforcement under Section 301. Application of the preemption doctrine would lead to wholesale exclusion of cases from contractual enforcement on the grounds of arguable NLRB jurisdiction (See Pet. Br., p. 24), a result clearly at odds with *Smith*. Respondent's last resort analogy to

the preemption cases would read into Congress' intent to make the NLRB the exclusive agency to enforce federal policy vis-a-vis the states, the intent to subordinate federal court contract enforcement authority under Section 301 to NLRB jurisdiction, in the face of its express intent to place contract enforcement in the courts rather than the Board.[5] See *Plumber's Union* v. *Borden*, 373 U.S. 690, 693, n. 3.[6] The asserted analogy between this case and the preemption decisions, which Respondent asserts but does not develop or explain, does not exist.

"The Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under Section 301 of the Labor-Management Relations Act." *Carey* v. *General Electric Co.*, 315 F. 2d, at 508. Respondent furnishes no reason to revive it.

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[5] Respondent's reliance on the *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 is misplaced. Under *Guss*, state courts or administrative agencies could not acquire jurisdiction *they lacked* merely because the Board declined to assert its exclusive jurisdiction. But here it is relevant to consider whether federal court jurisdiction which *exists* under Section 301 to enforce contracts should be exercised in the light of practical difficulties which might result from referral to the Board and the possibility that some disputes might otherwise go unresolved. See *Carey* v. *General Electric Co.*, 315 F. 2d, at 509.

> "The fact that the Board's docket is notoriously overcrowded and that Board decisions are often slow in coming, that the remedies which the Board may fashion are often inflexible, that time limitations or jurisdictional restrictions may effectively eliminate the possibility of administrative action, and that the grant of a hearing in any event is wholly within the discretion of the General Counsel of the Board—all of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board."

[6] The Summers article, quoted at length by Respondent, gives little support to its position. Thus, the concluding portion of his statement as quoted confirms a Congressional policy to prefer "private processes" which "should have full play unless they clearly contravene substantial policies of the Act." It confirms also that even where there is an actual conflict of policy, the question remains as to how it is to be resolved. (Resp. Br. 41-42).

C. *There Is No Policy Disclosed By The Act Which Precludes Arbitration in This Case*

Respondent's policy emanations from Sections 7, 8, 9 and 10, and Titles II and III of the Act, which it asserts establish an intent to entrust the underlying grievance dispute solely to the NLRB are neither of the spirit nor of the flesh. All studiously ignore Congress' intent to provide for enforcement of collective bargaining agreements under Section 301, and the fact that the dispute to be arbitrated is between Petitioner and Respondent (See pp. 18-22, *infra*; Pet. Br. 14-15). The policy arguments are heavily intermixed with and difficult to separate from Respondent's persistent speculations as to the dire nature and results of arbitration.[7] But taken alone, the policies Respondent gleans from the cited sections of the Act would be of sweeping application and would seriously restrict contract enforcement.

Respondent asserts that Section 7 rights would be infringed by arbitration because the only means by which IUE can achieve the objective of its grievance is a proceeding under Section 9, and that it would be unlawful for the Union to insist Respondent bargain with it with respect to this objective (Resp. Br. 15-16). These contentions are based upon a misconception of both Sections 7 and 9.

Indeed, if the Board could place the engineering laboratory employees in the IUE unit through amendment of the certification without an election, as Respondent claims

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[7] Thus, in connection with the Section 9 argument, the assumption throughout is that the remedy will affect the scope of bargaining units (Resp. Br. 25-26), that the remedy will affect statutory rights (Resp. Br. 26), that success in arbitration will result in merger of the entire engineering laboratory operations in the production and maintenance unit (Resp. Br. 27), that the award will give rise to new disputes (Resp. Br. 28-29), and that NLRB proceedings would remedy the contract violation alleged in the grievance. (Resp. Br. 28-29).

(Resp. Br. 17-18), it is immediately apparent that there is no reason to assume without proof that an identical determination by an arbitrator interpreting the collective bargaining agreement would violate Section 7 rights. The only authorities cited for Respondent's assertion that such an award would be repugnant to the policies of the Act, are two companion cases,[8] arising out of the same facts, in which the union in negotiations insisted as a condition of agreement upon expansion of its recognition to a unit of substantially greater geographic scope than that for which it had bargaining rights. There was no question in that case as to whether a group of employees came within the scope of the unit for which the union was certified and entitled to bargain. Interpretation of an existing recognition agreement was not involved, and the vice flowed not from the Union's request to enlarge its unit, but from its refusal to bargain on any other terms.

It is Respondent who has ignored the Section 7 rights of its employees. For Section 7 confers upon employees the right "to bargain collectively through representatives of their own choosing . . . for the purpose of collective bargaining or other mutual aid or protection," and that right includes the right of the employees represented by Petitioner to bargain as to work performed and employment outside the unit in order to protect the wages, hours and working conditions of those within it. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-295. Clearly the right to enforce the bargain struck cannot be contrary to policy if the very policy cited grants the right to bargain to reach it.

Respondent's evaluation of Section 7 rights furthermore treats the present circumstances, which Petitioner claims are in violation of its agreement, as the status quo which

[8] *Douds* v. *Int'l. Longshoremen's Ass'n.*, 241 F. 2d. 278 (C.A. 2); *Int'l. Longshoremen's Ass'n.*, 118 NLRB 1481.

Petitioner seeks to disturb in violation of Section 7 rights (Resp. Br. 22). But for purposes of the grievance, the status quo is that which was changed by the unilateral acts of Respondent which Petitioner contends were in violation of contractual rights. To the extent that restoration of the status quo involves Section 7 rights, it involves the mere undoing of any infringements of employee rights which may have accompanied the claimed contract violation.[9]

The Section 7 contentions in conjunction with the assertion of possible violation of Section 8(a)(1)(2), and (3) and 8(b)(1) and (2) are subject to the same infirmities (Resp. Br. 21-22).[10]

Respondent asserts that from Section 9 "The overall inference seems clear that disputes as to the coverage of units previously prescribed by NLRB and as to representational status were intended to be entrusted solely to NLRB" (Resp. Br. 24), and further, "The only legal means by which IUE can seek the objective of its grievance is a proceeding under Section 9 of the Act" (Resp. Br. 15). These contentions are completely unsupported by Section 9 or any other authority.

The procedures established by Section 9 were intended

[9] In this connection, Respondent's asserted interest in remaining neutral and protecting employee rights conveniently ignores that its unilateral acts lie at the base of Petitioner's grievance (Resp. Br. 21).

[10] There is neither evidence nor basis for presuming that the Union's effort to enforce its agreement are motivated by the union activities of employees. The only authority cited by Respondent for the proposition that it must remain neutral, *I.L.G.W.U.* v. *N.L.R.B.*, 366 U.S. 731, is not even remotely related to the assertion for which it is cited. There is no question here as to whether the interpretation of the IUE unit to include the disputed employees would result in IUE becoming a minority union which could no longer deal with the employer. Even Respondent in its construction of the grievance does not read it as seeking representation and bargaining for the engineering laboratory employees as a separate unit in which the union had not established its majority status. That this is the only alleged authority Respondent can cite under a statute more than 25 years old is some measure of the merit of its contention.

to provide a means for establishing representational status where it could not be achieved through voluntary recognition, not as a means of policing the composition of bargaining units. As this Court held in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, "Section 9(c) . . . does not make it a condition that the representative . . . shall be certified by the Board, or even be eligible for such certification." 351 U.S. at 71-72, "The Act does not . . . require prior resort to a Board determination whenever the *parties* establish an appropriate bargaining unit." *Retail Clerks Union, Local No. 324 (Vincent Drugs No. 3, Inc.)* 144 NLRB No. 108. (Emphasis in original) Nor is it material that the Board may once have certified the Union as the majority representative in an appropriate unit. Indeed, in *Douds* v. *Int'l. Longshoremen's Ass'n.* supra, upon which Respondent relies, the court stated:

> "Finally, [the Board's decision as to appropriate unit] may be altered by agreement of the parties, if the process of alteration involves no disruption of the bargaining process or obstruction on commerce and if the Board does not disturb the agreement in a subsequent representation proceeding." 241 F. 2d., at 282.

Certainly, if parties can agree to alter the unit, they can agree to the means to interpret their agreement as to unit, and the assertion that the possible result is itself necessarily repugnant to the Act is without foundation. See also Pet. Br. 18. Respondent does not seem to take issue with the right of parties to agree to arbitrate disputes over unit where only a single established unit is involved (Resp. Br. 29-30). Thus, its contention that the Board's jurisdiction under Section 9 is exclusive appears to be limited to the case where two unions with separate established units are

involved.[11] Such a policy manifestation cannot stem from any policy disclosed by Section 9, but only from Respondent's assertion that in such circumstances the dispute "must finally go to the NLRB." (Resp. Br. 28). Thus, the truncated policy argument under Section 9 is really another version of the argument that serious problems will arise if arbitration is enforced, and is in error for the same reasons.

If Respondent's policy arguments which it seeks to derive from Sections 7 and 9 were to be sustained, of necessity their application could not distinguish between cases where one union is involved and cases where two unions are involved. For unrepresented employees are given Section 7 rights to refrain from union activity, just as represented employees are protected in engaging in such activity, and Section 9 policy and procedure applies to all questions concerning representation and not merely those where more than one union is involved. Indeed, the absence of such distinction discloses that the assault on arbitration in this case extends far beyond its circumstances. See *Carey* v. *General Electric Co.*, 315 F. 2d, at 508; *Retail Clerks* v. *Thriftimart, Inc.*, 380 P. 2d 652; pp. 28-29, *infra*.

There is no evidence that Section 10(k) together with Section 8(b)(4)(D) was intended to protect neutral employers from "any sort of harassment from any union

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[11] The Board's *Novak Logging Co.*, 119 NLRB 1573, and *Midwest Piping and Supply Co.*, 63 NLRB 1060, cited as authority for the policy of Section 9 are not only completely inapplicable on the facts and the law, but represent an application of the Act which is far from settled. See *N.L.R.B.* v. *North Electric Co.*, 296 F. 2d 137 (C.A. 6), setting aside 129 NLRB 675; *Pittsburgh Valve Co.* v. *N.L.R.B.*, 234 F. 2d 565 (C.A. 4), setting aside 114 NLRB 193; *N.L.R.B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 7), setting aside 103 NLRB 1750.

The reliance on these decisions underscores the frailty of reliance upon the possible resolution by the Board of hypothetical situations as a basis for denial of arbitration.

party to a work assignment dispute" (Resp. Br. 35), and the suggestion that efforts to arbitrate a grievance constitutes "harassment" displays a misunderstanding going beyond these sections. Likewise, there is no policy demanding final determinations of work assignment disputes under Section 10(k). Sections 10(k) and 8(b)(4)(d) reflect a policy of discouraging work assignment disputes which result in actual or threatened work stoppages or coercion of employers, and not an intent to produce final and binding determinations of all work assignment disputes. Indeed, proceedings under Section 10(k) do not result in such determinations. See *Tacoma Printing Pressmen's Union No. 44 (Valley Printing Company)*, 131 NLRB 1090. Respondent's suggestion (Resp. Br. 36) that Section 10(k) indicates a policy to discourage arbitration here so that tripartite arbitration may be encouraged ignores in addition, as does Respondent's brief consistently, the possibility that arbitration will have salutary effects, and instead focuses on the worst that may ensue.

Likewise Respondent's inversion of Section 201, 203(d), and 301(a) (Resp. Br. 36-38) to indicate a policy of denial of arbitration here is not only unwarranted, but ignores that it is the contract dispute which Petitioner seeks to arbitrate.

The feeble and speculative policy emanations on which Respondent relies are not of the stuff which denials of contractual rights are forged.

D. *The Possibility of a Conflicting Claim of Another Union Does Not Warrant Denial of Arbitration.*

Respondent speculates upon the possibility that an arbitration award in this case in favor of Petitioner may give rise to a counterpart proceeding by the Federation under its agreement, and assigns this as a reason for concluding that "a serious problem" within the meaning of *Smith* has

arisen in this case. (Br. pp. 16-17). This asserted problem arises, not out of the concurrent jurisdiction of the Board and the Courts, but out of the concurrent contracts of the two unions. Thus, it falls completely outside the category of problems which this Court in *Smith* reserved for future consideration. Nor should it constitute grounds for denial of arbitration.

Assuming that conflicting awards are among the possible consequences of enforcement of the obligation to arbitrate, the remedy does not lie in denial of arbitration and permitting the Company to act unilaterally without regard to its obligations under either of the agreements which may give rise to the conflict.

As in the case of other claimed serious problems, raised by Respondent, this problem is speculative and need not be faced until and unless it arises. At present, neither union has an award. If the Company succeeds in persuading an arbitrator that it did not violate its agreement with Petitioner, the possibility of conflicting awards is at an end. Furthermore, until the facts found by the arbitrator, the grounds of his decision, the remedy awarded, and the Federation's position are known, there is no reason to presume that the Federation will challenge compliance with an award in favor of the Union, or seek arbitration of the issue under its agreement, or that if it does, it will win.[12]

If the spectre of conflict should ultimately materialize, it is then time to apply for relief, for such relief can be much better fashioned when contractual obligations have been properly defined, and the nature of the problem and of the

[12] It is possible in a rare case that conflicting agreements may exist justifying conflicting awards. In that event, a question of remedy may arise, but it does not follow that no remedy should be available to either party, or that their contracts should be ignored leaving the offender free to act unilaterally. This problem is not unique to labor relations. See 5, *Corbin on Contracts*, § 1169, pp. 735-736 West Publishing Company, 1951.

conflict are precisely known. See *Carey* v. *General Electric*, supra, 315 F.2d, at 512(C.A. 2) [13]

II. Affirmance of the Decision Below Would Be Contrary to Federal Policy Relating to Enforcement of Arbitration Agreements and Would Deprive Unions of Enforcement of Important Substantive Rights.

A. *The Decision Below Would Impair Enforcement of Arbitration Agreements Generally.*

In its efforts to shore up the decision below with the sounds of preemption and exclusivity, Respondent has given no heed to the impact of its repairs upon the availability of Section 301 for enforcement of contract arbitration generally. Respondent would apply *Smith* on the basis of possible, but hardly certain, disastrous collisions, or it would apply preemption or analogize it, (without setting forth the mechanics of the analogy), or it would dismiss this suit without any "doctrine." But in its negativism it provides no clue as to the impact of its "doctrines", or "no doctrines", upon the general scheme of enforcement of arbitration generally. Certainly the basis of decision advanced below, and indeed any basis suggested, would thwart the policy of *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564. Pet. Br. pp. 23-25. Affirmance on any of the grounds advanced by Respondent would promote the search for a federal question in every grievance which a recalcitrant party to an arbitration agreement sought to avoid arbitrating and the "strong emphasis, placed upon arbitration as a means of peacefully and expeditiously resolving labor disputes . . . might be

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[13] The Government brief, pp. 19-21, suggests possible anticipatory means to avoid conflicting awards, at the same time pointing to possible difficulties inherent in them. The Union believes that it is unnecessary to consider in this case the questions thus raised. See Resp. Br. 38.

immeasurably frustrated." *Carey* v. *General Electric Co.* 315 F. 2d, at 509.

Moreover, Respondent, by focusing only on possible problems which might arise following arbitration, ignores the benefits which can flow from arbitration, even in the context of the present case. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564. "Although the ideal solution of the grievance would bring both conflicting unions before a single tribunal . . . arbitration between one of them and the employer may nonetheless be a force for industrial peace." *Carey* v. *General Electric Co.*, 315 F. 2d, at 511.

In the light of the federal policy favoring enforcement of arbitration provisions of collective bargaining agreements and the fact that arbitration itself can result in no serious problem which cannot be dealt with as easily after arbitration has occurred, there can be no justification for denying arbitration in this case.[14]

B. *The Grievance Dispute To Be Arbitrated Is A Contract Dispute Between Petitioner and Respondent For Which the National Labor Relations Act Provides No Relief Before The Board and Which Involves Important Contractual Rights.*

Respondent persistently seeks to equate the existing two-sided contractual question between Respondent and Petitioner with a three-sided dispute which does not now, and may never, exist. Respondent argues that since the National Labor Relations Board might resolve the three-sided dispute, if brought before it, Petitioner has lost its right to enforcement of its contractual rights. Thus for a de-

[14] Indeed, Petitioner is unable to conceive of any context in which the enforcement of the obligation to arbitrate would give rise to a serious problem arising out of a conflict with NLRB jurisdiction which would require resolution in advance of arbitration.

termination of Petitioner's contract rights, it would substitute a noncontractual determination of a different dispute by the Board. It would justify the substitution on the grounds that both forms of proceedings are methods of resolving disputes, and it would ignore the important contractual rights lost in the substitution.

1. *The Dispute To Be Arbitrated is Between Petitioner and Respondent and Not Between Petitioner and Another Union.*

Respondent in its brief consistently states the facts underlying the grievance in the version most favorable to its position, ignoring the questions of fact to be resolved in arbitration which the limited record as to the underlying grievance reveals, as well as one critical fact undenied on this record. Whether Petitioner's factual allegations will ultimately be sustained or not is immaterial to the outcome of this case. What is material, however, is whether Petitioner is entitled to an opportunity to establish its facts and support its contentions before an arbitrator. Certainly the rule of construction in the *Steelworkers'* cases entitles Petitioner to have the arbitrability of its grievance judged on its claim and not on the basis of Respondent's defense to its claim.[15]

Respondent asserts that IUE by its grievance seeks to extend "IUE's representation status to a new group of employees who have not chosen IUE as their bargaining representative" and thus to enlarge its present unit by adding to it the entire engineering laboratory, (Rep. Br. p. 13, 15, 27), and that IUE is an "aggressor union" attacking the jurisdiction of the Federation which is "the certi-

[15] *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582, 585; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593.

fied representative of the employees in issue" by "assaulting" the employer, which is cast in the role of an innocent "neutral." (Resp. Br. p. 32-36).[16] The dispute is described as "truly . . . between IUE and Federation." (Resp. Br. p. 37). These assertions and characterizations are unsupported. By them Respondent seeks to hide an important contractual dispute, which exists whether or not the Federation also has a claim to pursue.

Despite Respondent's strong protests that the record establishes this as a certification grievance in which the work assignment issue is "new wine" (Resp. Br. 13-17), the record establishes that the work assignment element of the grievance has been in the case all along and is uncontested by Respondent.

In the petition in the New York Supreme Court which initiated this action, Petitioner's general statement of its grievance (R. p. 12-13) described the question of application of the agreement and the claimed violation alleged—not the underlying facts and not the nature of the remedy sought.[17]

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[16] Respondent's characterization of IUE's grievance in its brief as an attempt to add the entire engineering laboratory to its bargaining unit in the face of a conflicting Federation certification is refuted by Company documents and statements in the record. In denying arbitration, Respondent's Arbitration Representative stated that the grievance pertained to "certain employees in the Enginering Laboratory." (R. 16). Its affidavits are to the same effect (R. 29).

[17] Respondent asserts that Petitioner consistently described its grievance "as a protest of Respondent's refusal to apply the IUE Agreement to the engineering laboratory employees (Br. p. 5). But as indicated in the portion of the IUE affidavit which Respondent quotes, Petitioner consistently asserted that the grievance "merely involves a violation by the Company of the rights of the Union to represent the employees who perform production and maintenance work". This is a statement of the violation alleged not the remedy sought, and under the contract it is the claim of violation which makes the grievance arbitrable, not the remedy sought. Respondent's assertion that Petitioner seeks "the benefits of the contract for employees" transferred to the engineering laboratory, quot-

Respondent in answer described the grievance as seeking the inclusion of certain Engineering Department employees in the IUE unit (R. 20).[18] It filed a supporting affidavit setting forth the history of the two units at Baltimore and asserting that the Union sought to represent employees performing certain operations in the salaried unit represented by the Federation. The affidavit made no averment as to the nature of the work performed by these employees (R. 26-31).

Petitioner's affidavit in reply (R. 35-36) stated the Union's claim and strenuously objected to the characterization of the grievance as a "certification grievance." It pointed out that Petitioner claimed a violation of its contractual rights by virtue of two interrelated actions of the Company: (1) the transfer of production and maintenance *work* from the bargaining unit to the engineering laboratory and (2) the transfer of production and maintenance *workers* from the bargaining unit to the engineering laboratory. This affidavit again described the claimed violation without specifying the remedy sought.

By further affidavit, Respondent took vigorous exception to Petitioner's claims as to number of employees transferred.[19] But no issue was taken with the claim that pro-

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ing a phrase from an affidavit in support of the petition, and that this means that IUE seeks to represent employees in the Engineering Laboratory, takes the quoted phrase out of context to suggest that the grievance was directed at a specific remedy (Resp. Br. p. 6). It is descriptive of the effect of the violation, not the remedy sought for it (R. 36).

[18] The Company at all times has sought to mask the ambiguity of the actual grievance statement (R. 41) by correcting its syntax to make the grievance read in essence "the employees (who) are performing certain operations should be in the IUE unit." But the syntax may be as easily corrected to read "the employees are performing certain operations (which) should be in the IUE unit."

[19] This disagreement is immaterial to the question of arbitrability. Respondent, in reply, also disputed that the grievance involved interpretation, application, or claimed violation of the Agreement, an issue no longer in the case. See "Question Presented" (Resp. Br. p. 2).

duction and maintenance work was moved into the laboratory. (R. 39-41). Thus, on the record the issue of work assignment is not only of respectable vintage, but virtually conceded as a part of the facts out of which this grievance arises.

Significantly, Respondent's Sur-reply affidavit also makes no claim that the Federation would assert the right under its certification or contract to perform the production and maintenance work which was transferred to the engineering laboratory. (R. 39-41). Indeed, Respondent's description of the Federation unit in its initial affidavit in opposition as excluding employees who perform work for the purpose of production and maintenance, leaves in doubt whether such a right could or would be claimed by the Federation. (R. 27). While the Federation may not have rejected the gratuitous windfall wafted in its direction by the Company's unilateral transfer of work, there is no evidence that it has claimed the work as work to which it is entitled, and there is not even an allegation of rival claims by the two unions for the performance of this work.[20]

Thus, Respondent's efforts to substitute the Federation for itself as the Union's real antagonist ignore the record and distort the underlying grievance. The underlying grievance arises out of Respondent's conduct for which it must answer under its contract, and not out of any dispute between rival unions in which Respondent is a passive neutral.

Even if the grievance involved only transfer of employees without work and were accurately described by

[20] With respect to the Federation, in Respondent's affidavit in opposition, it alleged only that if the Company treated the *employees* in the Engineering Lab as covered by the IUE contract, the Federation "could" make out the same claim for arbitration. Respondent was silent as to what the Federation could or would do in its reply to the Hockenberry affidavit which raised the undenied allegation with respect to work assignment.

Respondent, it is the position of the parties that the outcome should be the same. (Resp. Br. 13). As we have indicated, Petitioner takes this position because, regardless of the characterization of the grievance, there is no cause to deny the Union the right to enforcement of its contract (Union Br. 15-20).[21] But, we have answered Respondent's assertions as to the character of the grievance because we believe that this area of disagreement between Respondent and Petitioner underscores that Respondent's invitation to the courts to intervene to relieve it of its agreement to arbitrate is premature and harmful. Moreover, however the facts develop in arbitration and whatever problems may develop in the future as to remedy, Petitioner has a right to have an arbitrator determine whether or not its agreement has been violated. Respondent is silent as to its reasons for denying Petitioner such determination, and would substitute for it noncomparable procedures.

2. *Determination of Petitioner's Claim of Contractual Breach Is Unavailable Before the Board*

Respondent asserts that "relief" can be had in a Section 9 proceeding. But Respondent avoids comparison of the relief available in a Section 9 proceeding involving a certification dispute with relief available in a contract arbitration. Indeed, such a comparison must be avoided if Respondent's contention is to be accepted, for until an ar-

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[21] If the outcome were dependent upon the characterization of the grievance, then it would be necessary to try in court, in advance of arbitration, not only the question of whether the grievance overlapped in any respect with matters cognizable by the Board, but the exact nature of the overlap, necessitating a complete trial on the facts and inevitably involving the courts in the question of remedy, for the character of the grievance and of its overlap cannot be determined until the remedy is known. See p. 6, *supra*. Respondent's independent reliance on Section 9 suggests that its agreement that outcome of this case should not depend on the character of the grievance may be qualified (Resp. Br. 24-31).

bitrator has acted, there is no contractual relief to be compared, and it necessarily follows that the relief before the Board may differ substantially from that which would be available in arbitration.

Petitioner submits, moreover, that there is in any event a critical difference between arbitration and a proceeding before the Board which would deny it any determination of the contractual breach it seeks to arbitrate.

Respondent concedes that in a Section 9 proceeding the Board will not go behind an employer's assignment of work tasks (Resp. Br. p. 18-19). Instead, it will determine the appropriateness of the unit on the basis of the tasks as assigned, presuming the right of the employer to have made the assignments before it. On the basis of those assignments, if may determine the unit placement of the employees, but it will not determine how the tasks should be assigned.[22]

Thus, to the extent that an arbitrator might award a reassignment of work, such relief is unavailable under Section 9. But even if the prospective relief awarded by the arbitrator were in the same form as a Board's determina-

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[22] Any inference to the contrary to be drawn by Respondent's quotation from a footnote in the Government's brief (Resp. Br. p. 20, quoting S.G. Br. p. 23, n. 23), is quickly dispelled by a reading of the *Gas Service Company* case cited therein. As the Board stated therein: "Thus, it is now clear that the Petitioner in effect is asking the Board to assign to employees in the unit represented by the Petitioner certain of the work now being done by employees in the Pipeline Division. However, work assignment disputes are not properly matters for consideration in representation proceedings. As the Board has said, its sole function in representation proceedings is to ascertain and certify the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit. It is not the Board's responsibility in representation proceedings to decide whether employees in the bargaining unit are entitled to do any particular work or whether an employer has properly reassigned work from employees in the bargaining unit to other employees. Accordingly, the Petitioner's motion, insofar as it requests the Board to assign certain work to employees in the certified unit, is hereby denied." 140 NLRB No. 45, at pp. 3-4.

tion in a Section 9 proceeding, the Board, unlike the arbitrator, would not determine whether the collective bargaining agreement was violated and would leave the contractual claim, unanswered with any past breaches unremedied. Respondent's silence as to the distinction between the contractual basis of an arbitration award and the noncontractual basis of Board action cannot obscure its existence and significance.

Respondent concedes that it would be undesirable to force the Union to commit an unfair labor practice, "however harmless", to obtain a work assignment determination by the NLRB (Resp. Br. 35). Respondent's reliance on Sections 8(b)(4)(D) and 10(k) arises instead in connection with its assertion that the Board will afford "relief" for work assignment disputes in representation cases, (Resp. Br. 20),[23] and that as such relief is available in Section 10(k) proceedings, it must be available in Section 9 proceedings.

Apart from the fact that the relief in the Section 9 proceeding is not the same as that under Section 10(k),[24] there is substantial doubt whether the Board would view the instant dispute between the Union and the Company as a violation of Section 8(b)(4)(D) had it struck or threatened to strike to regain the production and maintenance work. In *Highway Truckdrivers and Helpers, Local 107, (Safeway Stores)*, 134 NLRB 1320, the Board quashed a notice of hearing under Section 10(k), following the de-

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[23] As indicated above, the Board consistently declines to assign work in representation cases. While parties may occasionally raise work assignment questions in representation proceedings, requiring the Board to consider such questions in that context, it is clear that the relief available in one type of proceeding is not available in the other, and nothing in the government brief suggests the contrary. Compare *Local 3, Metal Polishers Union (Cleveland Pneumatic Tool Co.)*, 142 NLRB No. 48, with *Gas Service Company*, 140 NLRB No. 45, quoted in n. 22, *supra*.

[24] See notes 22, 23, *supra*.

cision of this Court in *N.L.R.B.* v. *Radio & Television and Broadcast Engineers Union Local 1212*, 364 U.S. 573. In the *Safeway* case the dispute was created by the conduct of the employer in transferring the work from a unit represented by one union which sought to keep it, to another unit represented by another union which "did not press . . . for the work." Construing the decision of this Court in *N.L.R.B.* v. *Radio & Television Engineers*, 364 U.S. 573, the Board held:

> "The thrust of the *CBS* decision, was to be sure, directed at the Board's misconception of the kind of determination required by Section 10(k). But, in terms, the Supreme Court said it was 'The Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision'. 364 U.S. 573, at 585. Implicit in this directive is the proposition that Section 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved. Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a 'jurisdictional dispute' exists within the meaning of the cited statutory provisions." 134 NLRB at 1322.

With respect to the facts the Board held:

> "It is apparent that the dispute here is not in its very nature the kind that Congress devised Section 10(k) to resolve. In the normal situation, the Section 10(k) proceeding is designed to determine which of two competing employee groups is entitled to do the disputed

work. In the normal situation also, the employer is willing to assign the work to either group if the other will just let him alone. We do not mean to suggest that this is the only kind of situation where Section 10(k) is applicable. But the normal situation demonstrates how far removed is the instant case where the employer by his unilateral action created the dispute, by transferring work away from the only group claiming the work. We venture the suggestion that nothing in the lengthy legislative history of the jurisdictional dispute provisions can be read as suggesting that Congress conceived this as the type of dispute to which those provisions were to be regarded as applicable." 134 NLRB, at 1323.

See also *Teamsters & Truck Drivers, Local 70 (Hill Transportation Co.)*, 136 NLRB 1086; *Sheet Metal Workers Int'l. Assn.*, 136 NLRB 1402; *Wood, Wire & Metal Lathers International Union*, Local No. 238 *(Acoustics & Specialties, Inc.)*, 139 NLRB 598.

Moreover, despite Respondent's stress on the asserted absence of a final and binding determination in arbitration as a reason to deny arbitration, even if the Board were to consider a strike or threat to strike, in support of the Union's grievance as a violation of Section 8(b)(4)(D), a determination under Section 10(k), while binding on the Unions, is not binding upon the employer. Assuming the Board awarded the work to Petitioner, the employer would not be compelled to obey the award, and the Union would be free merely to strike in support of its claim. *Tacoma Printing Pressmen's Union No. 44 (Valley Printing Company)*, 131 NLRB 1090. Nor would Respondent be restrained by a Section 9 determination from removing work or employees from a bargaining unit. Thus, proceedings under the Act are neither dispositive of the contract dis-

pute, nor final and binding upon an employer as to the disputes they resolve.

Thus, Respondent's claim that final and binding relief is available before the Board for the contract violation is without foundation.[25]

3. *Respondent Seeks to Preclude Enforcement of Important Contract Rights*

The dispute which Respondent seeks to hide goes to the heart of Petitioner's rights to preserve the wages, hours and working conditions of its members.[26]

Respondent attempts to minimize the significance of its agreement to recognize Petitioner by asserting, without any record support, that there was no bargaining with either Petitioner or the Federation with respect to Respondent's recognition obligations. Its asserts further that, in accordance with the scheme of representation and bargaining established industrial unionism, the recognition clauses do not purport to assign work but only describe the classes of work performed in the respective units. (Resp. Br. 5). These gratuitous intimations of frivolity, echoing the discarded *Cutler-Hammer* doctrine (*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564) are more appropriate for argument

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[25] Respondent does not contend that "relief" would be available to Petitioner in a proceeding pursuant to Section 8(a)(5), and it is clear that the Board would dismiss any charge of violation of Section 8(a)(5) raising a question of contract interpretation which could be resolved through the grievance procedure. *Montgomery Ward & Co.*, 137 NLRB 418; *Hercules Motor Corp.*, 136 NLRB 1648; *Denver-Chicago Trucking Co.*, 132 NLRB 1416; *I. Oscherwitz & Sons*, 130 NLRB 1078; *McDonnell Aircraft Corp.*, 109 NLRB 930.

[26] Respondent's asserted "neutrality" and its branding of Petitioner as an "aggressor" in a dispute over recognition may be tested by asking the question: Would Respondent be "neutral" if the Federation agreed with Petitioner that its grievance had merit and that the remedy should be recognition of Petitioner for the employees in the engineering laboratory? Compare *Westinghouse Electric Corp.*, 144 NLRB No. 49.

in the arbitration proceeding than in the determination as to whether the grievance should be arbitrated. But Respondent's sterile characterization of the recognition clause, and inferentially of the substance of the grievance dispute is also without justification.

The recognition clause is what gives life and meaning to every other provision of the collective bargaining agreement, for frequently only the recognition clause insures that the standards of the agreement will not be undermined by assigning the duties of the employees to whom it is meant to apply to other employees. To the extent that an employer is free to have bargaining unit work performed by employees to whom the agreement does not apply, every term and condition bargained for by the union is in jeopardy. Thus, it is beside the point whether or not the parties bargained over Respondent's recognition obligations. What is critical is that all bargaining was dependent upon Respondent's concurrent agreement to recognize the Petitioner (See Resp. Br. pp. 21-23), and the significance of the claimed violation in this case is not reducible to a mere question of remedy.

Moreover, whether or not the recognition clause in this case has the significance which Petitioner claims is immaterial. For Respondent's attack goes beyond this clause and beyond the case in which two unions are actually vying for the same work or employees. Respondent's policy arguments necessarily encompass efforts to enforce clear and unambiguous agreements which seek to protect bargaining units against erosion through product change, technological change, automation, or the mere availability of a labor source which will work on more favorable terms. Respondent's assertion that Section 9 gives the Board exclusive jurisdiction over a dispute which arises over a unilateral transfer of work or employees outside the bargain-

ing unit is but an attempt to build into all agreements an automatic management rights provision voiding any agreement the parties may have reached among themselves to the contrary.

But protection against such erosion is the daily concern of collective bargaining,[27] and denial of enforcement of the bargains arrived at would inevitably result in "industrial strife and unrest" obstructing commerce which is the policy of the Act to eliminate. Section 1 of the Act.

Since the decision in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, this Court has unfalteringly given the fullest play to Section 301 in enforcing collective bargaining agreements in fulfillment of the Congressional intent. No occasion is presented here for a first backward step to create an exception which Respondent can neither justify nor formulate.

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[27] See *Telegraphers* v. *Chicago and N.W. R. Co.*, 362 U.S. 330; *Teamsters Union* v. *Oliver*, 358 U.S. 283; *Renton News Record*, 136 NLRB 1294, 1297; *Houston Chapter Associated General Contractors*, 143 NLRB No. 43; Sen. Rept. No. 1308, 84th Cong., 2d Sess., p. 12 (1956); Frederick R. Livingston, *An Approach To Automation*, N.Y.U. Fourteenth Annual Conference on Labor 301, Matthew Bender & Co., 1961; Carroll L. Coburn, *A Union View of Automation*, N.Y.U. Fourteenth Annual Conference on Labor 313.

Conclusion

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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